INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Argument	8
Conclusion	23
Appendix	24

CITATIONS

Cases:	
Davis v. *United States*, 148 F. 2d 203	10
Glasser v. *United States*, 315 U. S. 60	17
Hickock v. *Hunter*, 150 F. 2d 635	10
Landay v. *United States*, 108 F. 2d 698, certiorari denied, 309 U. S. 681	19
Leonard v. *United States*, No. 834, O. T. 1946, certiorari denied, March 3, 1947	21
Mortenson v. *United States*, 322 U. S. 369	17
Pietch v. *United States*, 110 F. 2d 817, certiorari denied, 310 U. S. 648	19
United States v. *Dilliard*, 101 F. 2d 829, certiorari denied, 306 U. S. 635	19
United States v. *Fish*, 154 F. 2d 798, certiorari denied, 328 U. S. 869	14
United States v. *Socony Vacuum Oil Co., Inc.*, 310 U. S. 150	10, 17
Zimberg v. *United States*, 142 F. 2d 132, certiorari denied, 323 U. S. 712	15
Statutes:	
Act of June 20, 1936, c. 640, § 1, 49 Stat. 1561, 28 U. S. C. 695	21
Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632 (50 U. S. C. App., Supp. V, 901, *et seq.*):	
Sec. 4 (a)	24
Sec. 205 (b)	25
Sec. 302	18
Second War Powers Act of 1942, as amended, 56 Stat. 176 (50 U. S. C. App., Supp. V, 631, et seq):	
Sec. 301 (5)	24

737766—47——1

Regulations: Page
Revised Maximum Price Regulation 169 as amended (9 F. R. 9617):
Sec. 1364.407 (f) 4, 18, 27
Revised Ration Order 16 (9 F. R. 6731):
Sec. 10.3 ..... 3, 25
Sec. 11.7 ..... 17, 18, 26
Sec. 11.8 ..... 17, 18, 26
Sec. 20.1 (b) 26
Miscellaneous:
Federal Rules of Civil Procedure, Rule 44(a) 21
Federal Rules of Criminal Procedure, Rule 27 21

In the Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 1946

NOS. 1068–1069

SAUL S. FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 556–565) is reported at 158 F. 2d 891.

JURISDICTION

The judgments of the circuit court of appeals were entered December 30, 1946 (R. 566, 567), and a petition for rehearing was denied January 30, 1947 (R. 568). The petition for writs of certiorari was filed February 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b)

(2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the indictment and information were void for failure to particularize the specific parts of the applicable O. P. A. regulations involved.

2. Whether the conspiracy indictment is void on the ground that the underlying substantive offenses allegedly required a combination of the co-conspirators.

3. Whether the indictment is void because it failed to state that the conspiracy was formed in the district of indictment, where overt acts were charged as having occurred within that district.

4. Whether the trial court erred in its instructions to the jury with respect to: (a) proof beyond a reasonable doubt; and (b) imputation of certain knowledge to petitioner.

5. Whether, under the circumstances, it was prejudicial error for the trial court not to have specifically instructed the jury with respect to: (a) wilfulness; (b) the requisite proof that one of the overt acts set forth in the conspiracy indictment occurred in the district of indictment; (c) the inapplicability of the ration and price regulations to the particular transactions involved; and (d) their duty to disregard alleged prejudicial argument of the prosecutor referring

to the fact that petitioner's alleged co-conspirator had pleaded guilty.

6. Whether a certain exhibit was admissible in evidence.

7. Whether certain impeaching testimony was admissible in evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act of 1942, the Emergency Price Control Act of 1942, and regulations promulgated thereunder are set out in the Appendix, *infra*, pp. 24–27.

STATEMENT

On June 25, 1945, an information in 16 counts was filed in the District Court for the Eastern District of Washington, charging that petitioner and Ralph W. Jacobs and Irving B. Rose, violated the Second War Powers Act of 1942, the Emergency Price Control Act of 1942, and certain orders and regulations promulgated thereunder (R. 2–16). Only counts 1, 6, 7, 8, 9, 11, 12, 14, 15 and 16 named petitioner as a defendant. Count 1 charged that petitioner and Jacobs violated Revised Ration Order 16 (see Section 10.3, *infra*, p. 25), by acquiring 40 quarters of beef from a seller in Montana without surrendering the required ration points (R. 2–3). Counts 11 and 12 charged that petitioner and Rose acquired four barrels of fresh beef on two separate occasions

from a seller in Minneapolis, Minnesota, without proper ration evidences (R. 10–12). Counts 14 through 16 charged that petitioner violated Revised Maximum Price Regulation 169 (see Section 1364.407 (f) *infra,* p. 27), in that he failed to furnish a statement in the nature of a receipt covering the several transfers of portions of the 40 quarters of beef involved in counts 6 through 9 (R. 13–15). On August 11, 1945, an indictment was returned in the same district charging all of the same defendants with conspiracy to commit the substantive violations upon which counts 1, 6 through 9, and 14 through 16 of the information of June 25, 1945 were predicated (R. 17–22). After a consolidated jury trial on the information and the indictment, petitioner was found guilty on all counts of the information applicable to him and on the indictment (R. 24–25, 34).[1] He was sentenced to imprisonment for ten months each on counts 1 and 11 of the information and on the indictment, these sentences to run concurrently, and to pay a fine of $1,000 each on counts 11 and 12 of the information. On counts 6 through 9 and 14 through 16 of the information imposition of sentence was suspended and petitioner placed on probation for a period of six months, to commence at the expiration of the

[1] Jacobs pleaded guilty (R. 371). Rose who was tried with petitioner was found guilty on counts 2, 3, 4, 5, 11 and 12 (R. 24–25). The record does not indicate what sentences were imposed upon Jacobs and Rose.

service of the sentences of imprisonment. (R. 27–29, 36–37.) On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioner's convictions were affirmed (R. 566, 567).[2]

The evidence in support of the Government's case may be summarized as follows:

Petitioner, a public accountant in Spokane, Washington, conceived the idea, in the summer of 1944, of establishing a restaurant in Spokane (R. 186–189). He, Rose, and one Huse, entered into negotiations with the result that Rose and Huse formed a partnership for the operation of Huse's Restaurant (R. 190–199), and employed petitioner as its paid managing director and accountant (R. 200–204). The agreement contemplated that petitioner would loan $10,000 to Huse for the venture, and that when this money was returned, petitioner would have a 1/6 interest in the business (R. 200–202). The money was not repaid (R. 208), and Huse dropped out before the business was fully developed (R. 220). Petitioner was very active in the business; he negotiated the lease for the premises occupied by the restaurant (R. 61–65), signed all checks (R. 194), and by agreement of all the interested parties exercised complete authority to determine the business policy of the venture (see, e. g., R. 151–152, 193, 383–384). At petitioner's instigation

[2] Separate appeals were taken by petitioner from his conviction on the information and that on the indictment (R. 31, 38).

(R. 122, 395), one Louis Michael, a restaurant man and a former O. P. A. employee (R. 395) was hired to run the restaurant and take care of rationing problems (R. 142–143, 422, 396). The restaurant opened in December 1944 and lost money from the start (R. 397). Shortly after the opening, petitioner asked Ralph W. Jacobs, his codefendant, to assist in the operation of the business on the inducement that Jacobs might later acquire an interest in the business (R. 357–358).

The violations charged in the information and indictment were predicated on the following two series of transactions:

(1) In a discussion concerning the acquisition of meat for Huse's Restaurant, Jacobs told petitioner that he (Jacobs) could borrow some points from another account, but that such points would have to be paid back (R. 359). Petitioner gave Jacobs $500 of his personal funds to use in buying meat (R. 361, 436). Jacobs then made two separate purchases of meat in Minneapolis giving the seller only part of the required points and those points were "borrowed" from another account (R. 360, 142). The balance of the points owed on the Minneapolis purchase were never paid (R. 238–242). The meat was shipped from Minneapolis to the restaurant in Spokane in February 1945 (R. 132). Petitioner notified Michael of the expected arrival of the meat (R. 134–135).

(2) Upon being informed by Jacobs that some meat could be purchased in Missoula, Montana, without ration points, petitioner told Jacobs to "Buy the meat; it was a good buy" (R. 363). Jacobs went to Montana and purchased forty quarters of meat with $2,500 in cash that petitioner had given him (R. 363–364) from his personal funds (R. 436). The meat was then shipped from Missoula in March 1945, on a bill of lading describing the shipment as "poultry" and, in accordance with petitioner's instructions, consigned to him (R. 364, 279). After the meat arrived in Spokane it was put in cold storage in petitioner's name (R. 367, 419). No ration points were ever given the Montana seller for this meat (R. 150, 413), nor did petitioner mention anything about giving ration points for it (R. 149), for, as Michael testified, "There couldn't have been. We didn't have enough points to pay for anything like that" (R. 150). The meat was later withdrawn from storage in small quantities and used in the restaurant, and no ration points were surrendered at those times (R. 381–386). On May 25, 1945, when petitioner sold the restaurant to the Pacific Coast Railroad Men's Association, thirteen quarters of the beef remained in cold storage (R. 443–444). Rose testified that petitioner instructed him to withdraw four of these quarters and turn them over to the Association.

737766—47——2

No points were received for this transfer. (R. 384–386).

Petitioner claimed that he knew nothing about O. P. A. ration regulations (R. 410). However, he had previously sought and signed requests for additional ration allotments on behalf of another restaurant, with which he was connected, when it had overdrawn its ration account (R. 458–461). Moreover, the initial application for ration points for Huse's Restaurant was prepared in petitioner's office (R. 220, 221).

ARGUMENT

At the outset, we should like to note that, as petitioner concedes, "Trial counsel interposed no demurrer to the indictment or information nor made any request for a bill of particulars. No challenge to the sufficiency of the government's evidence was interposed at the conclusion of the government's case in chief. No motion for directed verdict was made at the conclusion of the entire case. No requested instruction on *wilful* (sic) was offered by trial counsel although one was offered by the government (R. 24) and not given. Trial counsel did not except to the giving of the instructions involved or to the failure to give any of the instructions here in issue. Many of [petitioner's] assignment of errors to the introduction of evidence and the argument of government counsel are not supported by exceptions." (Pet. 33–34). Petitioner relies on the "plain er-

ror" doctrine (Pet. 34), and upon the theory that even if no single alleged error is conceived to have been prejudicial, the accumulation of many did constitute prejudice (Pet. 47), to support his overall assertion that he was denied a fair trial. He apparently assumes that review on certiorari is determined by the quantity rather than the quality of the asserted errors. We submit, however, that the various alleged errors were waived by the failure to make timely objection or exception and that, even if petitioner's failure in the trial court to raise any of the issues now advanced is not deemed to belie the claim of "plain error," our seriatim treatment of the questions presented will conclusively serve that purpose.

1. Petitioner contends that the indictment and information were deficient in failing to particularize the specific parts of the applicable ration order violated (Pet. 35–36, 39). The court below furnished a decisive answer to this contention in stating that the information referred to the sections of the Revised Ration Order allegedly violated, and set out with sufficient certainty all of the necessary elements of the offense and that, had petitioner felt unable to defend, because of the lack of more definite information, he should have moved for a bill of particulars (see opinion below at R. 561).

2. Petitioner's contention, that the conspiracy indictment was void because the offenses allegedly

conspired to have been committed involved the mutual cooperation of the persons charged, and that therefore the preliminary agreement between the parties to commit the offenses was not an indictable conspiracy (Pet. 35), was also fully answered by the court below (see opinion at R. 563). The conspiracy as charged in the indictment involved more than those parties—buyer and seller—necessary to the illegal transaction; it included on the purchasing side of the transaction the buyer (petitioner) and other persons, associated with him in the restaurant enterprise, who were not necessary parties to the substantive violation arising from petitioner's purchase of the Montana meat.

3. Petitioner urges that the indictment is also void because it failed to state where the conspiracy was formed or even that it was formed in the United States (Pet. 34). However, as the court below pointed out (R. 562–563), the indictment charged that petitioner received and put the 40 quarters of beef into cold storage at Spokane, Washington (R. 20), thus satisfying the requirements for venue in that district. Cf. *United States* v. *Socony Vacuum Oil Co., Inc.,* 310 U. S. 150; *Davis* v. *United States,* 148 F. 2d 203 (C. C. A. 5); *Hickok* v. *Hunter,* 150 F. 2d 635 (C. C. A. 10).

4. (a) Petitioner contends, with respect to the instructions given the jury, that the trial court's definition of proof beyond a reasonable doubt was

erroneous (Pet. 36–38). The burden of this contention is the assertion that "The instruction manifestly deprives petitioner of his fundamental right to an acquittal if the government fails to prove the affirmative of the issues involved beyond a reasonable doubt and shifted the burden to petitioner to show that there was a doubt based on reason before he could be acquitted" (Pet. 37).

The disputed instruction, set out in the margin,[2] clearly follows accepted patterns and,

[2] "The law presumes every defendant to be innocent until such one is proven guilty by the evidence beyond all reasonable doubt. This presumption is not a mere matter of form. It is a substantial right of every defendant in every case. Such presumption continues throughout the entire trial and until the jury finds that such presumption has been overcome by the evidence beyond all reasonable doubt.

* * * * *

" 'Proof beyond all reasonable doubt' means just what the words imply, that any doubt which will justify acquittal must be a reasonable doubt, must be a doubt based upon reason. 'Proof beyond all reasonable doubt' does not mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of the jury. A reasonable doubt must arise from the evidence or lack of evidence. A reasonable doubt must not arise from sympathy and no one has a right to use reasonable doubt as an excuse for avoiding an unpleasant duty. A reasonable doubt is not a mere whim or vague misgiving founded upon mere possibility. Only such doubt as an honest fair-minded man or woman would reasonably entertain is [sic] an honest and impartial investigation to ascertain the truth about the serious matters of life would be a reasonable doubt. In order to warrant conviction as to any count the evidence before you must not be such as to exclude all doubt or possibility of doubt, but it must be

in our opinion, is not in any way open to the challenge now advanced by petitioner. If nothing else, that portion to the effect that a reasonable doubt must arise from the evidence or "lack of evidence" (R. 478) manifestly demonstrates that the jury was advised that the Government carried the burden of proof throughout the trial (cf. also first paragraph in fn. 3, *supra*, p. 11). Had petitioner believed there was something in the instruction which might leave the jury to assume otherwise, he should have requested a clarifying instruction.

(b) Petitioner also complains of an instruction which he asserts permitted the jury to impute the knowledge of Michael to him (knowledge Michael obtained from Jacobs pertaining to the purchase of the Montana beef without ration points) (Pet. 43–44). However, this instruction,

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strong enough to exclude from your mind all reasonable doubt. If, after considering all the evidence in this case, you can say that such leaves in your mind a firm, honest and abiding conviction as to the guilt of the defendants or either of them, as to any count or counts, or as to any charge or charges, then you are convinced beyond a reasonable doubt and then it is your duty to find such defendants or defendant guilty as to such count or counts or such charges or charge. On the other hand, if you do not have a firm, honest and abiding and conscious conviction as to the guilt of the defendants or one of the defendants as to any count or counts or as to any charge or charges, then you have a reasonable doubt and then it is your duty to find such defendant or defendants not guilty as to any such count or counts, charge or charges. Frequently, 'proof beyond all reasonable doubt' is defined as proof to a moral certainty." (R. 476, 478–479.)

set forth in the margin,[4] merely advised the jury that if they found Michael to be an accomplice because he knew the law was being violated, they could then consider whether it was reasonably likely Michael could have known this without petitioner and others connected with the restaurant having at least as much knowledge. The instruction did not require an imputation of Michael's knowledge to petitioner, and it only permitted the jury to make such an inference on the condition that they first find that in fact Michael was petitioner's accomplice. With that prerequisite, such an inference was clearly permissible, particularly in view of the compelling evidence showing the close working relationship of petitioner and Michael (see, e. g., Statement *supra*, pp. 5, 6, 7), and in the light of the trial court's cautionary instruction that the testimony of an accomplice must be scrutinized carefully (R. 500–501).

5. (a) Petitioner contends that the charge to the jury was fatally deficient in that the trial court failed to explain and define what constitutes a "wilful" violation, wilfulness being a statutory prerequisite of all the offenses charged (Pet. 38–39). While the court did not specifically define

[4] "In the event you are convinced or believe that Mr. Michael was an accomplice in that he knew that the law was being violated, you have the right, of course, then, to consider whether it is reasonably likely that he would have known such without the other persons connected with the restaurant having at least as much knowledge" (R. 501).

the word "wilful," it did in other parts of its charge [5] require the jury to find elements which in substance constitute wilfulness in order to convict petitioner. Consequently, the absence of a specific definition of wilfulness did not prejudice petitioner for the jury was required to find, for example, that the violations were "knowingly and intentionally committed for the purpose of carrying forward a scheme to violate the law." Cf. *United States* v. *Fish,* 154 F. 2d 798, 801 (C. C. A.

[5] The pertinent parts of the charge which in effect covered the elements of "wilfulness" are as follows:

"You are advised that the law presumes that every man intends the natural and probable consequences of his own acts and intent may be presumed if unlawful acts have been committed, and it is shown that such acts were a part of a plan and were knowingly and intentionally committed for the purpose of carrying forward a scheme to violate the law as charged. The evidence of intent may be shown by the acts of the parties concerned and by the attendant circumstances as well as by direct evidence. It is psychologically impossible to enter into the minds of the defendants and determine the intention with which they acted or the purpose they had or the knowledge they possessed and, therefore, it is required that you determine under the evidence the knowledge they had and their intention and the purpose from the evidence and all the facts and circumstances shown by the evidence" (R. 479.)

"First, that there was a plan or scheme knowingly undertaken and agreed upon to commit an offense or offenses against the United States; and, second, that some overt act, that is, some affirmative act, was done by at least one of the parties for the purpose of affecting [sic] the object of the scheme or conspiracy. It is not necessary that it be established beyond a reasonable doubt or at all that the conspiracy succeeded if persons knowingly and intentionally associated themselves together with the understanding

2), certiorari denied, 328 U. S. 869, and *Zimberg* v. *United States,* 142 F. 2d 132, 137–138 (C. C. A. 1), certiorari denied, 323 U. S. 712, holding that wilfulness under the Emergency Price Control Act means knowingly and intentionally.

(b) Petitioner further objects to the omission from the charge of an instruction that at least one of the overt acts charged in the conspiracy indictment must have been proved to have been

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that they would violate some of the laws of the United States as charged in the indictment; and if one or more of them did one or more acts for the purpose of accomplishing the object, then all are guilty regardless of whether the scheme succeeded or not. To prove that the conspiracy as charged existed and was in operation, it is not necessary to prove that the defendants or any of them entered into a written or oral agreement or made any declaration acknowledging membership therein, but it is necessary to prove that they knowingly and intentionally conspired together for the unlawful purpose charged in the indictment and that at least one or more overt acts as charged was committed by one or more of them. When an unlawful object is knowingly sought to be effected and two or more persons actuated by a common purpose intentionally work together in any manner in furtherance thereof, every person knowingly participating is a party to the conspiracy no matter what part he may take in the execution of the plan or how small or trivial his part may be. Any act done by one of the parties to such a conspiracy knowingly in furtherance of the common plan is in contemplation of the law the act of all the parties and that is whether they know about it or not, and likewise any one of the conspirators is bound by the statements and declarations made by a co-conspirator made during the life of the conspiracy for the purpose of helping achieve the object of the conspiracy." (R. 483–484.)

committed in the Eastern District of Washington (Pet. 42–43). This contention is patently specious. The indictment listed at least 6 overt acts which are charged to have been committed in the Eastern District of Washington (R. 19). And, according to petitioner's own testimony, he advanced Jacobs $500.00 and $2,500 in the Eastern District of Washington to make the Minneapolis and Missoula purchases (R. 436). Furthermore, he admitted purchasing the Montana meat by telephone conversation with Jacobs, petitioner then being in Spokane, Washington and Jacobs in Missoula, Montana (R. 405). Additionally, the proof showed that the restaurant's activities were conducted from its place of business in Spokane, Washington. In short, the evidence unequivocally showed that many of the overt acts and the conspiracy as a whole stemmed primarily from the Eastern District of Washington, so that at the trial there was not the slightest doubt that venue was properly laid. In this posture the trial court's omission of a specific instruction in this connection was not error.

(c) Petitioner also argues—with respect to counts 6–9 and 14–16 (Montana meat)—that since there was no evidence of "sales" by petitioner to Rose, the provisions of the ration order requiring the receipt of points and the provision of the price regulation requiring a statement (receipt) were inapplicable, and that consequently these counts should not have been submitted to the

jury (Pet. 39–42). This argument is predicated on petitioner's assertion that the Montana meat was originally purchased for the restaurant and not by him for his own account, so that when the meat was withdrawn from cold storage and sent to the restaurant no "sale" was involved which required the giving of ration points or a statement in the nature of a receipt. Preliminarily, it should be noted that only the probationary sentence, and not the sentence ordering imprisonment and fines, depends upon the validity of the conviction on the foregoing counts (see Statement *supra*, pp. 4–5). In any event, petitioner's contention is without merit. As petitioner points out, Revised Ration Order No. 16 provides in part that no points need be surrendered for foods delivered from storage to the persons who stores them (Section 11.7 *infra*, p. 26), or for a return of those foods to the person who originally transferred them for security purposes (Section 11.8 *infra*, p. 26). There was, however, ample evidence that petitioner stored the meat for his own account, and that its transfer from the warehouse to the restaurant was a sale and not a withdrawal by the restaurant itself coming within the exception provided above.[6] Thus the evidence

[6] And on appeal the evidence must be taken in the light most favorable to the Government. See *Glasser* v. *United States*, 315 U. S. 60, 80; *Mortenson* v. *United States*, 322 U. S. 369; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

showed that petitioner advanced the money for the purchase of the Montana meat out of personal funds, that as directed by petitioner the meat was stored in Spokane under his and not the restaurant's name (see Statement *supra*, p. 7), and that his interests were not completely identifiable with those of the restaurant (cf. Pet. 40–41). Under these circumstances, had petitioner desired the jury to consider the defensive theory now advanced, that the withdrawal of the meat from the warehouse was merely an intra-business transfer within the exception provided either by Section 11.7 or 11.8 of the ration regulation, and that, therefore, ration points were not required as charged in counts 6–9, he should have made a timely request for appropriate instructions. By not so doing, he left the case in the posture well justified by the evidence, that he sold the meat to the restaurant in violation of the ration regulation.

For similar reasons, petitioner's objections relating to the submission to the jury of counts 14 through 16, charging a failure to furnish the statement required by Section 1364.407 (f) of Revised Maximum Price Regulation 169 (*infra*, p. 27) are without foundation. Furthermore, Section 302 (a) of the Emergency Price Control Act, 56 Stat. 23, 36 (50 U. S. C. App., Supp. V, 942 (a)), defines "sale" to include any "dispositions, exchanges, leases and other transfers." Thus, even if the transfer of the Montana meat from storage to the restaurant is not to be consid-

ered a sale in the ordinary sense of the word, that transfer could not be made without furnishing the statement required by the Maximum Price Regulation.

(d) Petitioner's final complaint to the court's charge is that he was prejudiced by the omission of an instruction that the jury should disregard the argument of the United States Attorney to the effect that Jacobs' plea of guily to the conspiracy tended to prove the conspiracy between him and petitioner (Pet. 44–45). Since petitioner has not included in the record before this Court all of the argument of counsel, but merely the opening and closing statements of the United States Attorney, it cannot now be determined whether in context the particular statements complained of were unjustified or prejudicial. Cf. *Pietch* v. *United States,* 110 F. 2d 817, 822–823 (C. C. A. 10), certiorari denied, 310 U. S. 648; *United States* v. *Dilliard,* 101 F. 2d 829, 837 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Landay* v. *United States,* 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681. Moreover, it is patent that the disputed argument of the United States Attorney, set out in the margin,[7] was not directed to the conclusion that

[7] "I think, Ladies and Gentlemen of the Jury, if you consider the evidence that has been put in, there can be no doubt of any character concerning the unlawful agreement here between Freeman and Jacobs initially and then Rose coming into it, and the Court will instruct you on that phase of the law of conspiracy, the unlawful agreement

Jacobs' plea proved the conspiracy between him and petitioner, but that it was merely intended to show why Jacobs' veracity could be assumed. It was, of course, impossible to conceal from the jury the fact that Jacobs had pleaded guilty, since his name appeared on the indictment and information along with petitioner's, and since he testified without objection that he had pleaded guilty (R. 371). And certainly, it was permissible for the jury to infer that since Jacobs had pleaded guilty to the conspiracy, and had no further interest in the proceedings, his version of the events, rather than petitioner's, was to be believed.

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between Freeman and Jacobs, and then Rose being a party to it in withdrawing the meat and putting it inside of the restaurant.

"Who, in addition to Louis Michael and all that documentary evidence, says that there was an understanding with Freeman? Jacobs.

"Jacobs says, 'I did these things, and I did them with Freeman, and I have had the conversations with him, and I have plead guilty of being a party to a conspiracy with these two men in this thing.' If a conspiracy isn't a fact in the face of all that testimony, then Jacobs is a subject for a sanity commission.

"Jacobs had good legal advice and counsel. His counsel here in court is Frank McKevitt. Can you in the face of that admission of this man in court, who bares his breast and says, 'I am a man who was a party in that conspiracy, in those transactions and I am ready to take my medicine;' and on the other hand the evasive testimony of Freeman, whom I had to question continually before he would answer a question directly, can you say that that type of testimony is not overcome by the testimony that is buttressed by the plea of guilty by Jacobs himself." (R. 522–533).

6. It is urged that the trial court erred in admitting Exhibit 62 which is asserted to be highly prejudicial hearsay evidence (Pet. 45–46). Exhibit 62 is a certificate of the United States Department of Agriculture dated June 5, 1945, listing the remaining quarters of the Montana beef and the grade and weight fixed for each (R. 299–300). The exhibit was signed by one Davis, an employee of the Department of Agriculture, who identified it in evidence (R. 298) and testified to all the facts contained therein and the method of its preparation (R. 297). This testimony was not controverted, nor was Davis even cross-examined about the accuracy of his grading or as to the quantity of the meat (see R. 301–303). Furthermore, the certificate did not in any way add to his oral testimony. Its admission therefore, even if erroneous, could not have prejudiced petitioner. However, it is clear that the certificate was admissible, for it was an official document of the Department of Agriculture qualifying as *prima facie* evidence of the facts asserted therein by reason of its character as a public record. Rule 27, Federal Rules of Criminal Procedure; Rule 44 (a), Federal Rules of Civil Procedure; Act of June 20. 1936, c. 640 § 1, 49 Stat. 1561, 28 U. S. C. 695. See also pp. 8–10, memorandum for the United States in Opposition in *Leonard* v. *United States,* No. 834, O. T. 1946, certiorari denied, March 3, 1947.

7. Petitioner's final complaint is that it was prejudicial error for the trial court to admit certain impeaching testimony of the witness Michael (Pet. 46–47). Petitioner was cross-examined in detail by the prosecutor with respect to a conversation with Jacobs in Huse's Restaurant concerning the purchase of the Montana meat. In questioning petitioner, the prosecutor placed the conversation as having occurred a few days before the first of February, 1945. (See R. 436–437.) Petitioner did not recall having had this conversation (R. 437). Thereafter, Michael was questioned about all the pertinent details of this conversation, but in propounding the questions to Michael the prosecutor placed the conversation as having occurred a few days before March 1, 1945 (R. 470). Petitioner's counsel did not object to this questioning on the ground that a proper foundation had not been laid; he merely objected on the ground that it was not within the issues of the case and that it attempted impeachment on an entirely collateral matter (R. 471). Examination of the complete text of the pertinent testimony clearly shows (1) that both witnesses were questioned with regard to the same alleged conversation; (2) that the witnesses, the jury, and all other participants so understood it; and (3) that the prosecutor merely made a negligible slip in placing the conversation before the first of March 1945 in the one instance and before the 1st of February 1945 in the other.

CONCLUSION

We resectfully submit that the judgment below is clearly correct, and that, therefore, the petition for writs of certiorari should be denied.

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APRIL 1947.

APPENDIX

The Second War Powers Act of 1942, as amended (56 Stat. 176, 50 U. S. C. App. Supp. V, 631 et seq.), provides in pertinent part:

> Section 301 (5). [50 U. S. C. App., Supp. V, 633 (5)] Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, 901, *et seq.*) provides in pertinent part:

> SEC. 4 (a) [50 U. S. C. App., Supp. V, 904 (a)] It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
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SEC. 205 (b) [50 U. S .C. App., Supp. V, 925 (b)] Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Revised Ration Order 16 (9 F. R. 6731), promulgated pursuant to the Second War Powers Act, provides in pertinent part:

SEC. 10.3. *Transfers to retailers, wholesalers and primary distributors after April 10, 1943 may be made only for points.* (a) Beginning April 11, 1943, no person may sell or transfer foods covered by this order to a retailer, wholesaler, or primary distributor, and no retailer, wholesaler or primary distributor may buy or acquire those foods, unless points are given up in the way this order requires. (The word "transfer", as it is defined, means to sell, as well as to transfer in other ways. The word "acquire" means to buy, as well as to get in other ways. Therefore, the only words which will generally be used, in later sections, are "transfer" and "acquire".)

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SEC. 11.7 *Foods may be stored and returned from storage, point-free.* (a) No points need be given up for a delivery of foods covered by this order for storage purposes only.

(b) No points need be given up for a delivery of such foods from the place of storage to the person who stored them, or to a person to whom he has sold or transferred them. (However, that sale or transfer must be made in a way permitted by this order.)

SEC. 11.8 *Security interest in foods may be created and released, point-free.* (a) No points need be given up for a transfer of foods covered by this order, or of any interest in them, for security purposes only. (For example, if such foods are pledged or mortgaged, the person with whom they are pledged or mortgaged need not give up points.)

(b) No points need be given up for a release of a security interest in such foods, or for a return of those foods to the person who originally transferred them for security purposes. (For example, a person who pledged those foods may get them back without giving up points. Similarly, a person who gave a chattel mortgage on them need not give up points when the mortgage is ended.)

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SEC. 20.1 *Additional prohibitions.* * * * (b) No person shall "transfer", "acquire", use or possess "foods covered by this order" except in a way permitted by this or any other order of the Office of Price Administration.

Revised Maximum Price Regulation 169 (8 F. R. 4097), as amended, promulgated pursuant to

the Emergency Price Control Act, provides in pertinent part (9 F. R. 9617):

SEC. 1364.407 (f) Whenever used in this paragraph (f), the term "shipment" shall mean all commodities which are consigned to a single buyer as part of a single freight car or truck movement for delivery to the place of business or warehouse of the buyer, other than a consignment for delivery of the entire content of a common carrier freight car or truck to a war procurement agency.

(1) Except as provided in paragraph (f) (2) of this § 1364.407, every person making a sale of any beef carcass, beef wholesale cut, veal carcass, veal wholesale cut, processed product or other meat item subject to this revised regulation, shall furnish to the purchaser at the time of delivery a written statement setting forth the name and address of the buyer and seller; identifying each such item sold; setting forth the quantity, grade, including sex identification of beef as to stag or bull, the weight thereof, and the price charged and/or received therefor, including a separate statement of the transportation and local delivery charge as required by § 1364.454 (a) (7).

(2) (i) In the case of any shipment made to a buyer located within a radius of 25 miles from the seller's distribution point, and in the case of any C. O. D. shipment made, irrespective of the distance, each person shipping any of the meat items subject to this revised regulation, shall send with each such shipment, a copy of the written statement referred to in paragraph (f) (1) hereof.

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